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AMERICAN TIMBER AND STEEL CO., INC.,  
sued herein and f/k/a MIDWESTERN WHOLESALERS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO/OAKLAND DIVISION

KEVIN JOYCE,

Plaintiff,

v.

MIDWESTERN WHOLESALERS, INC., an  
Ohio corporation, and  
DOES 1 through 50, inclusive,

Defendants.

AMERICAN TIMBER AND STEEL CO.,  
INC., f/k/a MIDWESTERN  
WHOLESALERS, INC., an Ohio corporation,

Counterclaimant,

v.

KEVIN JOYCE, an individual, and  
ROES 1 through 10, inclusive,

Counter-Defendants.

Case No. C 07-5404 JCS

**I. ANSWER TO THE FIRST  
AMENDED COMPLAINT**

**II. AFFIRMATIVE DEFENSES TO  
THE FIRST AMENDED  
COMPLAINT**

**III. COUNTERCLAIM**

Complaint Filed: August 14, 2007  
Trial Date: None

**I. ANSWER.**

Defendant American Timber and Steel Co., Inc., sued herein and formerly known as  
Midwestern Wholesalers, Inc. (“American Timber”), answers the “First Amended Complaint for

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1 Damages (Employment)” filed by Kevin Joyce on September 5, 2007, in the Marin County  
2 Superior Court, prior to the removal of this action to federal court, as follows:

3 1. American Timber lacks information sufficient to admit or deny the allegations  
4 contained in paragraph 1 of the complaint.

5 2. American Timber admits that some of the acts giving rise to Joyce’s complaint  
6 occurred in California.

7 3. American Timber admits that it (including the name it was previously known as)  
8 was and is an Ohio corporation doing business in California. American Timber denies the  
9 remaining allegations in paragraph 3.

10 4. American Timber lacks information sufficient to admit or deny the allegations in  
11 paragraph 4.

12 5. American Timber lacks information sufficient to admit or deny the allegations in  
13 paragraph 5.

14 6. American Timber admits that in or about November 1995, it agreed to employ  
15 and compensate Joyce for selling American Timber’s products. American Timber denies the  
16 remaining allegations in paragraph 6.

17 7. American Timber admits that it agreed, at the time it hired Joyce, to provide the  
18 compensation set forth in Exhibit 1 to the complaint, subject to the terms and conditions  
19 applicable to Joyce’s employment, including Joyce’s loyal and faithful service. American  
20 Timber denies the remaining allegations in paragraph 7.

21 8. American Timber admits that in or about January 2005, Joyce’s employment was  
22 terminated.

23 9. American Timber denies the allegations in paragraph 9.

24 10. American Timber admits that in or about June 2006, it and Joyce entered into an  
25 agreement under which Joyce would act as a representative of American Timber. American  
26 Timber denies the remaining allegations in paragraph 10.

27 11. American Timber admits the allegations in paragraph 11.  
28

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12. American Timber incorporates by reference its responses to paragraphs 1 through 11 of the complaint.

13. American Timber denies the allegations in paragraph 13.

14. American Timber admits that Joyce could qualify for a bonus based on the amount of certain sales, and subject to certain terms and conditions. American Timber denies the remaining allegations of paragraph 14.

15. American Timber admits that it offered to pay certain expenses related to a car driven by Joyce, subject to certain terms and conditions. American Timber lacks information sufficient to admit or deny the allegations contained in the second sentence of paragraph 15. American Timber denies all remaining allegations of paragraph 15.

16. American Timber admits that it offered to pay certain expenses related to a car driven by Joyce, subject to certain terms and conditions. American Timber denies all remaining allegations of paragraph 16.

17. American Timber denies the allegations in paragraph 17.

18. American Timber incorporates by reference its responses to paragraphs 1 through 17 of the complaint.

19. American Timber denies the allegations in paragraph 19.

20. American Timber denies the allegations in paragraph 20.

21. American Timber denies the allegations in paragraph 21.

22. American Timber denies the allegations in paragraph 22.

23. American Timber incorporates by reference its responses to paragraphs 1 through 22 of the complaint.

24. Paragraph 24 purports to explain certain provisions of Labor Code section 512, the contents of which speak for themselves. American Timber respectfully refers to the statute itself. American Timber denies that it owed or owes any duty or liability to Joyce under such statute.

25. Paragraph 25 purports to explain certain provisions of Labor Code section 226.7 and certain wage orders, the contents of which speak for themselves. American Timber

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1 respectfully refers to the statute and wage orders themselves. American Timber denies that it  
2 owed or owes any duty or liability to Joyce under such statute or wage order.

3 26. American Timber denies the allegations in paragraph 26.

4 27. Paragraph 27 purports to explain certain provisions of Labor Code section  
5 226.7(b), the contents of which speak for themselves. American Timber respectfully refers to  
6 the statute itself. American Timber denies that it owed or owes any duty or liability to Joyce  
7 under such statute.

8 28. American Timber incorporates by reference its responses to paragraphs 1 through  
9 27 of the complaint.

10 29. Paragraph 29 purports to explain certain provisions of Labor Code section 227.3,  
11 the contents of which speak for themselves. American Timber respectfully refers to the statute  
12 itself. American Timber denies that it violated or is liable to Joyce under such statute.

13 30. American Timber denies the allegations in paragraph 30.

14 31. American Timber denies the allegations in paragraph 31.

15 32. American Timber denies the allegations in paragraph 32.

16 33. American Timber incorporates by reference its responses to paragraphs 1 through  
17 32 of the complaint.

18 34. Paragraph 34 purports to explain certain provisions of Labor Code section 201,  
19 the contents of which speak for themselves. American Timber respectfully refers to the statute  
20 itself. American Timber denies that it violated or is liable to Joyce under such statute.

21 35. American Timber denies the allegations in paragraph 35.

22 36. American Timber denies the allegations in paragraph 36.

23 37. American Timber denies the allegations in paragraph 37.

24 38. American Timber incorporates by reference its responses to paragraphs 1 through  
25 37 of the complaint.

26 39. American Timber admits that it offered to pay certain expenses related to a car  
27 driven by Joyce, subject to certain terms and conditions. American Timber lacks information  
28

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sufficient to admit or deny the allegations contained in the second sentence of paragraph 39.

American Timber denies all remaining allegations of paragraph 39.

40. Paragraph 40 purports to explain certain provisions of Labor Code section 2802, the contents of which speak for themselves. American Timber respectfully refers to the statute itself. American Timber denies that it violated or is liable to Joyce under such statute.

41. American Timber denies the allegations in paragraph 41.

42. Paragraph 42 purports to explain certain provisions of Labor Code section 2802, the contents of which speak for themselves. American Timber respectfully refers to the statute itself. American Timber denies that it violated or is liable to Joyce under such statute.

43. American Timber incorporates by reference its responses to paragraphs 1 through 42 of the complaint.

44. Paragraph 44 purports to explain certain provisions of the Unfair Competition Law, the contents of which speak for themselves. American Timber respectfully refers to the law itself. American Timber denies that it violated or is liable to Joyce under such law.

45. American Timber lacks information sufficient to admit or deny the allegations in paragraph 45.

46. American Timber denies the allegations in paragraph 46.

47. American Timber denies the allegations in paragraph 47.

48. American Timber denies that Joyce is entitled to any of the relief requested in paragraph 48.

## **II. AFFIRMATIVE DEFENSES.**

Each of the following affirmative defenses is stated as a separate and distinct affirmative defense to the First Amended Complaint, and each claim thereof:

### **FIRST AFFIRMATIVE DEFENSE (Failure to State a Cause of Action)**

Plaintiff's complaint, and each and every cause of action thereof, fails to state facts sufficient to constitute a cause of action against Defendants.

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**SECOND AFFIRMATIVE DEFENSE  
(Statute of Limitations)**

Plaintiff's complaint, and each and every cause of action thereof, is barred in whole or in part by the applicable statute of limitations including, but not limited to, Code of Civil Procedure sections 337.1 (written contract), 338(a) (liability created by statute), 339.1 (oral contract), and 343 (for actions otherwise not provided for), and Business and Professions Code section 17208 (UCL claims).

**THIRD AFFIRMATIVE DEFENSE  
(Unclean Hands)**

Plaintiff has not come to the court with clean hands. As a result, Plaintiff is not entitled to the relief requested in the complaint.

**FOURTH AFFIRMATIVE DEFENSE  
(Waiver, Estoppel, and Laches)**

Plaintiff has waived his right to maintain and is estopped from asserting each and every cause of action raised in his complaint. Plaintiff also is barred from asserting each cause of action by the doctrine of laches.

**FIFTH AFFIRMATIVE DEFENSE  
(Good Faith Conduct)**

Plaintiff's complaint, and each and every cause of action thereof, is barred because Defendant acted with probable cause and with the good faith belief that Defendant had valid grounds to take whatever actions were taken, if any.

**SIXTH AFFIRMATIVE DEFENSE  
(Plaintiff's Conduct)**

The events, injuries, losses, and damages contained in Plaintiff's complaint, if any there may have been, were the result of Plaintiff's own misconduct, negligence, mistake, act, or omission and occurred without any control, culpability, negligence, want of care, default, or other breach of duty to Plaintiff on the part of Defendant.

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**SEVENTH AFFIRMATIVE DEFENSE  
(Performance)**

Defendant performed each and every obligation required on its part, and has satisfied and/or discharged each and every term, provision, requirements, and/or obligation pursuant to any and all alleged contracts or transactions, to the extent the same existed.

**EIGHTH AFFIRMATIVE DEFENSE  
(Breach of Contract and of Duty of Good Faith and Fair Dealing)**

Plaintiff's material breaches of the parties' agreements or alleged agreements, and of the covenant of good faith and fair dealing, bar Plaintiff's claims, and also discharged and excused any further performance by Defendant.

**NINTH AFFIRMATIVE DEFENSE  
(Lack of Consideration)**

Plaintiff's claims are barred in whole or in part by a failure of consideration.

**TENTH AFFIRMATIVE DEFENSE  
(Failure to Fulfill Conditions Precedent)**

Plaintiff's claims are barred in whole or in part because Plaintiff has failed to fulfill the conditions precedent.

**ELEVENTH AFFIRMATIVE DEFENSE  
(Failure to Fulfill Employment Obligations)**

Plaintiff's recovery is barred because Plaintiff failed to fulfill his obligations as an employee pursuant to the provisions of the California Labor Code including, but not limited to, sections 2854, 2856-2863, and 2865, and as set forth in the Counterclaim below which is incorporated by reference.

**TWELFTH AFFIRMATIVE DEFENSE  
(Breach of the Duty of Loyalty, Breach of Fiduciary Duty, Lack of Good Faith)**

Plaintiff breached the duty of loyalty and/or fiduciary duty owed to Defendant, and failed to act in good faith in complying with his obligations under the law and any agreement with Defendant. As a result, such breaches and lack of good faith bar each cause of action set forth in Plaintiff's complaint.

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**THIRTEENTH AFFIRMATIVE DEFENSE**  
**(Failure to Mitigate Damages)**

Plaintiff has failed to mitigate his damages, if any. As such, Plaintiff's damages should be proportionately reduced.

**FOURTEENTH AFFIRMATIVE DEFENSE**  
**(At-Will Employment)**

Plaintiff's claims are barred in whole or in part by Labor Code section 2922.

**FIFTEENTH AFFIRMATIVE DEFENSE**  
**(Privilege / Justification)**

Defendant's actions, if any, were justified and/or privileged.

**SIXTEENTH AFFIRMATIVE DEFENSE**  
**(Consent)**

Plaintiff's claims are barred in whole or in part because Plaintiff consented to the conduct or acts, if any, upon which the claims are based.

**SEVENTEENTH AFFIRMATIVE DEFENSE**  
**(After Acquired Evidence)**

Plaintiff's recovery is precluded and/or limited by the "after acquired evidence" doctrine.

**EIGHTEENTH AFFIRMATIVE DEFENSE**  
**(Countervailing Interests)**

Defendant's conduct was justified because it substantively furthered one or more countervailing interests of Defendant, including but not limited to, promoting the efficiency of business operations, and protecting the health, safety, and well-being of management, staff, and customers.

**NINETEENTH AFFIRMATIVE DEFENSE**  
**(Apportionment of Fault / Contribution)**

In the event that a money judgment is rendered jointly against Defendant, Defendant shall be entitled to a right of contribution determined in accordance with the principles of equity.



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**TWENTIETH AFFIRMATIVE DEFENSE  
(Unsupported Request for Attorney's Fees)**

Plaintiff's complaint fails to state facts sufficient to support Plaintiff's prayer for attorney's fees.

**TWENTY-FIRST AFFIRMATIVE DEFENSE  
(Statute of Frauds)**

Plaintiff's complaint, and each and every cause of action thereof, is barred by the applicable statute of frauds, including Civil Code section 1624.

**TWENTY-SECOND AFFIRMATIVE DEFENSE  
(Frivolous Action)**

Plaintiff's action is frivolous and was brought in bad faith as those terms are defined in Code of Civil Procedure section 128.5 and the Federal Rules of Civil Procedure, rule 11, thereby entitling Defendant to the recovery of its reasonable expenses, including attorney's fees incurred.

**TWENTY-THIRD AFFIRMATIVE DEFENSE  
(Plaintiff Exempt from Statutes)**

Plaintiff's statutory claims are barred because such statutes did not apply to Plaintiff or his employment with Defendant, including, without limitation, because of applicable exemptions such as the outside salesperson exemption set forth in the applicable wage order.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE  
(Setoff/Offset)**

The damages alleged in the complaint, if any, are subject to setoff and/or offset and should, therefore, be proportionately reduced.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE  
(Fraud and Deceit)**

Plaintiff acted fraudulently in misrepresenting material facts to Defendant, concealing material facts Plaintiff had a duty to disclose to Defendant, and/or making promises to Defendant without the intent to perform, including as set forth in the Counterclaim below, which is incorporated by reference. Plaintiff, therefore, should be barred from any recovery.

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**TWENTY-SIXTH AFFIRMATIVE DEFENSE  
(Inapplicable Law)**

To the extent Plaintiff's causes of action are based on California law, each such cause of action fails because California law does not apply.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE  
(Abatement)**

To the extent Plaintiff's causes of action are based on an alleged violation of a California Labor Code provision, any liability of Defendant is reduced or eliminated by abatements properly taken or available to Defendant due to Plaintiff's conduct or breaches, including as set forth in the Counterclaim, which is incorporated by reference.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE  
(Additional Affirmative Defenses)**

Defendant reserves the right to amend this Answer as additional affirmative defenses become known and/or available to Defendant.

**III. COUNTERCLAIM.**

American Timber, for its Counterclaim against counter-defendants, alleges as follows:

**A. The Parties.**

1. American Timber, formerly known as Midwestern Wholesalers, Inc., is an Ohio corporation with its principal place of business in Ohio.

2. Kevin Joyce is an individual who, American Timber is informed and believes, was at all times relevant hereto a resident of Marin County, California.

3. Joyce commenced this action in state court against American Timber and Does 1 through 100, and the case has been removed to federal court based on diversity jurisdiction. American Timber is ignorant of the true names and capacities of counter-defendants sued herein as Roes 1 through 10, inclusive, and therefore sues these counter-defendants by such fictitious names. American Timber will amend this Counterclaim to allege such counter-defendants' true names and capacities when ascertained. American Timber is informed and believes and thereon alleges that each of these fictitiously named counter-defendants is responsible in some

1 manner for the occurrences herein alleged and that American Timber's damages as herein  
2 alleged were proximately caused by the conduct of those counter-defendants.

3 4. American Timber is informed and believes and thereon alleges that at all times  
4 mentioned herein each of the counter-defendants was the agent of each of the remaining  
5 counter-defendants and in doing the things herein after alleged was acting within the course and  
6 scope of such agency and with permission and consent of the other counter-defendants.

7 **B. Jurisdiction and Venue.**

8 5. Joyce initiated this action in state court. American Timber properly removed this  
9 action to federal court on October 23, 2007. This Court has subject matter jurisdiction over this  
10 Counterclaim under the supplemental jurisdiction statute, 28 U.S.C. section 1367(a). Were this  
11 Counterclaim asserted by way of a separate action, this Court would have subject matter  
12 jurisdiction under the diversity statute, 28 U.S.C. section 1332(a)(1), as this is an action between  
13 citizens of different states in which the amount in controversy exceeds \$75,000, exclusive of  
14 interest and costs. The Court also would have jurisdiction under 28 U.S.C. section 1331, as the  
15 Counterclaim asserts a claim under the Lanham Act (15 U.S.C. §§ 1051 et seq.).

16 6. This Counterclaim is properly pleaded in this action under Federal Rules of Civil  
17 Procedure, rule 13. Were this Counterclaim asserted as a separate action, venue would be  
18 proper in this district under 29 U.S.C. section 1391(a), as Joyce is a resident of this district  
19 within the meaning of 28 U.S.C. section 1391(c).

20 **C. Intradistrict Assignment.**

21 7. This action was properly removed to the San Francisco/Oakland division of this  
22 Court, as Joyce initiated the action in the Marin County Superior Court and a substantial portion  
23 of the events giving rise to this action occurred in Marin County, California.

24 **D. General Allegations.**

25 8. American Timber sells construction products, primarily for highway  
26 construction.

27 9. American Timber employed Joyce as a full-time salesperson from 1995 to 2005.  
28 In that position, Joyce had significant customer contact and access to American Timber's

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confidential, proprietary information, including American Timber's pricing information and the identity, contact persons, and buying histories of American Timber's customers. Joyce had a duty to maintain the confidentiality of such information.

10. As a term and condition of Joyce's employment, Joyce was not permitted to work for other companies without informing American Timber or if doing so would affect Joyce's job performance.

11. American Timber is informed and believes that during Joyce's employment, Joyce, unbeknownst to American Timber, worked for other companies, including competitors of American Timber. American Timber is informed and believes that Joyce utilized time for which he was being compensated by American Timber to compete against American Timber and direct business that should and would have been given to American Timber to other companies, and that in doing so Joyce used American Timber's property (e.g., its fax machine, toll-free number, stationary, trademark, trade name, and goodwill). American Timber is informed and believes that Joyce, during and after his employment, used and disclosed American Timber's confidential, trade secret information in competing against American Timber.

### **FIRST COUNTERCLAIM FOR RELIEF**

(Misappropriation of Trade Secrets -- Civil Code §§ 3426 Et Seq.)

12. American Timber repleads and realleges paragraphs 1 through 11 of its Counterclaim.

13. American Timber has at all times relevant hereto possessed valuable trade secrets, including information about American Timber's pricing and its customers. American Timber's confidential, proprietary, and trade secret information derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use. American Timber also has made at all times relevant hereto reasonable efforts in maintain the secrecy of such information.

14. American Timber is informed and believes that Joyce, both during and after his employment, misappropriated American Timber's trade secrets, including by using and

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disclosing the trade secrets, without American Timber's consent, to divert business to competitors of American Timber.

15. As a direct and proximate cause of Joyce's misappropriation of trade secrets, as alleged herein, American Timber has suffered damages according to proof at trial.

16. As a further direct and proximate cause of Joyce's misappropriation of trade secrets, as alleged herein, Joyce has been unjustly enriched.

17. American Timber is informed and believes that Joyce's misappropriation of American Timber's trade secrets was willful and malicious. Accordingly, American Timber is entitled to recover punitive damages, attorneys' fees, and costs in accordance with Civil Code sections 3426.3 and 3426.4.

### **SECOND COUNTERCLAIM FOR RELIEF**

(Misappropriation of Trade Secrets -- Common Law)

18. American Timber repleads and realleges paragraphs 1 through 17 of its Counterclaim.

19. American Timber is informed and believes that Joyce has misappropriated American Timber's trade secrets.

20. As a direct and proximate cause of Joyce's misappropriation of trade secrets, as alleged herein, American Timber has suffered damages, and Joyce has been unjustly enriched, according to proof at trial, which relief is recoverable under the common law. American Timber is further informed and believes that Joyce acted with fraud, malice, and oppressive, thereby warranting the imposition of punitive damages.

### **THIRD COUNTERCLAIM FOR RELIEF**

(Breach of Oral Contract)

21. American Timber repleads and realleges paragraphs 1 through 20 of its Counterclaim.

22. In or about November 1995, American Timber and Joyce entered into an oral agreement under which American Timber would employ Joyce as a salesperson. Joyce impliedly or expressly agreed, unless American Timber otherwise consented, to only perform

1 services for American Timber's benefit at all times he was being compensated by American  
2 Timber.

3 23. American Timber is informed and believes that Joyce, during his employment  
4 and as alleged above, breached the agreement by secretly working for others and competing  
5 unfairly with American Timber.

6 24. As a direct and proximate cause of Joyce's breach of contract, as alleged herein,  
7 American Timber has suffered damages according to proof at trial, including for salary,  
8 bonuses, and benefits paid to Joyce during those time periods that he was breaching his  
9 employment agreement with American Timber.

10 **FOURTH COUNTERCLAIM FOR RELIEF**

11 (Breach of Written Contract)

12 25. American Timber repleads and realleges paragraphs 1 through 24 of its  
13 Counterclaim.

14 26. Joyce has characterized his employment agreement as a written contract. While  
15 American Timber avers above that such agreement was oral, American Timber alternatively  
16 alleges that in or about November 1995, American Timber and Joyce entered into a written  
17 agreement under which American Timber would employ Joyce as a salesperson. As part of the  
18 agreement, Joyce impliedly or expressly agreed, as a term and condition of his employment and  
19 unless American Timber otherwise consented, to only perform services for American Timber's  
20 benefit at all times he was being compensated by American Timber.

21 27. American Timber is informed and believes that Joyce, during his employment  
22 and as alleged above, breached the agreement by secretly working for others and competing  
23 unfairly with American Timber.

24 28. As a direct and proximate cause of Joyce's breach of contract, as alleged herein,  
25 American Timber has suffered damages according to proof at trial, including for salary,  
26 bonuses, and benefits paid to Joyce during those time periods that he was breaching his  
27 employment agreement with American Timber.  
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## **FIFTH COUNTERCLAIM FOR RELIEF**

(Breach of Implied Covenant of Good Faith and Fair Dealing)

29. American Timber repleads and realleges paragraphs 1 through 28 of its Counterclaim.

30. As an employee of American Timber, Joyce had a duty of good faith and fair dealing to refrain from competing unfairly with American Timber during the time he was compensated to provide services on American Timber's behalf.

31. American Timber is informed and believes that during his employment, as alleged above, Joyce breached his duty of good faith and fair dealing by secretly working for others and competing unfairly with American Timber.

32. As a direct and proximate cause of Joyce's breach of the implied covenant of good faith and fair dealing, as alleged herein, American Timber has suffered damages according to proof at trial, including for salary, bonuses, and benefits paid to Joyce during those time periods that he was breaching his employment agreement with American Timber.

## **SIXTH COUNTERCLAIM FOR RELIEF**

(Violation of Duty of Loyalty and Labor Code §§ 2854 Et Seq.)

33. American Timber repleads and realleges paragraphs 1 through 32 of its Counterclaim.

34. Employees owe a duty of loyalty to their employers, and Labor Code sections 2854 et seq. (including sections 2854, 2856, 2858, 2860, 2861, 2863, and 2865) impose mandatory duties on employees relating to their employment, including using ordinary care, skill, and diligence in performing their service and complying with the directions of their employer, giving preference to the business of their employer, and accounting to the employer for all funds and property received on behalf of the employer.

35. American Timber is informed and believes Joyce breached his duty of loyalty and statutory duties owed to American Timber by secretly working for others and unfairly competing with American Timber.

1           36. As a direct and proximate cause of Joyce's breach of loyalty and breach of his  
2 statutory duties, as alleged herein, American Timber has been deprived of the compensation  
3 paid to Joyce during the time he was not acting on American Timber behalf, and Joyce has been  
4 unjustly enriched. American Timber requests damages according to proof at trial, and an order  
5 requiring Joyce to disgorge all compensation paid to Joyce during those times he was not acting  
6 on American Timber's behalf.

7                                   **SEVENTH COUNTERCLAIM FOR RELIEF**

8                                   (Fraud -- Concealment of Material Fact)

9           37. American Timber repleads and realleges paragraphs 1 through 36 of its  
10 Counterclaim.

11           38. Joyce impliedly or expressly agreed, unless American Timber otherwise  
12 consented, to only perform services for American Timber's benefit at all times he was being  
13 compensated by American Timber. Based on this agreement, and the duty of loyalty and  
14 statutory duties imposed on Joyce as alleged above, Joyce owed American Timber a duty to  
15 disclose whether he was working for others, including competitors, while receiving a salary for  
16 working full-time for American Timber.

17           39. American Timber is informed and believes that, in breach of his duty to disclose  
18 the fact, Joyce concealed and did not disclose to American Timber, with the exception of one  
19 other employer, that Joyce was working for others, including competitors, while receiving a  
20 salary for working full-time for American Timber. American Timber is informed and believes  
21 that Joyce intentionally concealed such information with the intent to defraud American Timber.  
22 American Timber was not aware of such information until after the termination of Joyce's  
23 employment, and it would not have acted as it did if it had known that Joyce was secretly  
24 working for others, including competitors.

25           40. As a direct and proximate cause of Joyce's concealment of material facts, as  
26 alleged herein, American Timber has suffered damages, and Joyce has been unjustly enriched,  
27 according to proof at trial, and including the salary, bonuses, and other compensation American  
28

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1 Timber would not have paid to Joyce had it been aware that Joyce was working for others and  
2 competing against American Timber.

3 41. American Timber is informed and believes that Joyce acted with fraud, malice,  
4 and oppressive, thereby warranting the imposition of punitive damages.

5 **EIGHTH COUNTERCLAIM FOR RELIEF**

6 (Trademark and Trade Name Infringement – Common Law)

7 42. American Timber repleads and realleges paragraphs 1 through 41 of its  
8 Counterclaim.

9 43. American Timber has adopted and used in California the trade mark and trade  
10 names “Midwestern Wholesalers, Inc.,” “American Timber and Steel Co., Inc.,” and variations  
11 thereof.

12 44. As alleged above, American Timber is informed and believes that, in secretly  
13 working for others, including competitors, Joyce used, without American Timber’s consent,  
14 American Timber’s property, including its fax machine, toll-free telephone number, stationary,  
15 trademark, trade name, and goodwill. For example, American Timber is informed and believes  
16 that Joyce solicited orders and/or provided sales quotes to customers using American Timber’s  
17 fax cover sheets, and that some such orders were placed by customers and filled by  
18 manufacturers other than American Timber, with none of the revenues being received by  
19 American Timber.

20 45. Joyce’s unauthorized use of American Timber’s trademark and trade name, as  
21 allege above, was likely to cause customer confusion as to the source of the goods to be  
22 provided (i.e., customers were likely to believe that American Timber was providing the goods  
23 and services when, in reality, another manufacturer or supplier provided the goods and related  
24 service).

25 46. As a direct and proximate cause of Joyce’s infringement of American Timber’s  
26 trademarks and trade names, as alleged herein, American Timber has suffered damages  
27 according to proof at trial. American Timber is informed and believes that Joyce acted with  
28

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1 fraud, malice, and oppression, and knowingly and deliberately with the intent to infringe  
2 American Timber's trademarks or trade names.

3 47. American Timber requests an order enjoining Joyce from further using or  
4 infringing American Timber's trademarks or trade names.

### 5 **NINTH COUNTERCLAIM FOR RELIEF**

6 (Trademark and Trade Name Infringement – Lanham Act)

7 48. American Timber repleads and realleges paragraphs 1 through 47 of its  
8 Counterclaim.

9 49. As alleged above, American Timber has adopted and used in California the trade  
10 mark and trade names "Midwestern Wholesalers, Inc.," "American Timber and Steel Co., Inc.,"  
11 and variations thereof; Joyce, upon information and belief, has used and infringed the  
12 trademarks and trade names without American Timber's consent; and Joyce's unauthorized use  
13 is likely to cause customer confusion.

14 50. Joyce's infringement of American Timber's trademarks and trade names, as  
15 alleged herein, violates the Lanham Act (15 U.S.C. §§ 1051 et seq.), and directly and  
16 proximately has caused American Timber to suffer damages according to proof at trial.  
17 American Timber is informed and believes that Joyce acted with malice, oppression, and fraud,  
18 and knowingly and deliberately with the intent to infringe American Timber's trademarks or  
19 trade names.

20 51. American Timber requests an order enjoining Joyce from further using or  
21 infringing American Timber's trademarks or trade names.

### 22 **TENTH COUNTERCLAIM FOR RELIEF**

23 (Unfair Competition -- Common Law)

24 52. American Timber repleads and realleges paragraphs 1 through 51 of its  
25 Counterclaim.

26 53. As alleged above, American Timber is informed and believes that Joyce secretly  
27 worked for others, including competitors, while receiving a salary for working full-time for  
28 American Timber, and during the course of doing so, Joyce misappropriated American Timber's

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1 trade secrets and used American Timber's property, including its fax machine, toll-free  
2 telephone number, stationary, trademark, trade name, and goodwill. Such conduct constitutes  
3 unfair competition.

4 54. As a direct and proximate cause of Joyce's unfair competition, as alleged herein,  
5 American Timber has suffered damages according to proof at trial, and Joyce has been unjustly  
6 enriched.

7 55. American Timber is informed and believes that Joyce acted with fraud, malice,  
8 and oppressive, thereby warranting the imposition of punitive damages.

9 **ELEVENTH COUNTERCLAIM FOR RELIEF**

10 (Violation of Unfair Competition Law -- Bus. & Prof. Code §§ 17200 Et Seq.)

11 56. American Timber repleads and realleges paragraphs 1 through 55 of its  
12 Counterclaim.

13 57. As alleged above, American Timber is informed and believes that Joyce secretly  
14 worked for others, including competitors, while receiving a salary for working full-time for  
15 American Timber, and during the course of doing so, Joyce misappropriated American Timber's  
16 trade secrets in violation of Civil Code sections 3426 et seq. and used American Timber's  
17 property, including its fax machine, toll-free telephone number, stationary, and goodwill, and  
18 infringed American Timber's trademark and trade name.

19 58. Joyce's business practices, as alleged above, constitutes unfair competition  
20 within the meaning of California Business and Professions Code sections 17200 et seq., in that  
21 his business practices are (1) forbidden by law, (2) immoral, unethical, oppressive, unscrupulous  
22 and substantially injurious, and/or (3) fraudulent.

23 59. As a direct and proximate cause of the above-described conduct, Joyce has been  
24 unjustly enriched at American Timber's expense. Consequently, Joyce should be required to  
25 disgorge all compensation paid to Joyce during those times he was not acting on American  
26 Timber's behalf.

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60. Under Civil Code section 3426.4 and Business and Professions Code sections 17200 et seq., American Timber is entitled to its reasonable attorneys' fees incurred herein.

**PRAYER**

WHEREFORE, Defendant and Counterclaimant American Timber prays for judgment as follows:

1. That Joyce take nothing by way of his First Amended Complaint or this action;
2. That Joyce's First Amended Complaint and all causes of action stated therein be dismissed with prejudice;
3. That judgment be entered in favor of American Timber and against Joyce on the First and Second Counterclaims for Relief, and that American Timber be awarded compensatory and punitive damages according to proof at trial, and that Joyce be ordered to disgorge all sums procured by him as a result of misappropriating American Timber's trade secrets;
4. That judgment be entered in favor of American Timber and against Joyce on the Third, Fourth, and Fifth Counterclaims for Relief, and that American Timber be awarded compensatory and special damages according to proof at trial;
5. That judgment be entered in favor of American Timber and against Joyce on the Sixth Counterclaim for Relief, and that American Timber be awarded compensatory and special damages according to proof at trial, and that Joyce be ordered to disgorge all compensation paid to Joyce during those times he was not acting on American Timber's behalf;
6. That judgment be entered in favor of American Timber and against Joyce on the Seventh and Tenth Counterclaims for Relief, and that American Timber be awarded compensatory, special, and punitive damages according to proof at trial, and that Joyce be ordered to disgorge all compensation paid to Joyce during those times he was not acting on American Timber's behalf;
7. That judgment be entered in favor of American Timber and against Joyce on the Eighth and Ninth Counterclaims for Relief, and that American Timber be awarded compensatory and punitive damages, treble damages to the extent provided by law, and that the

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1 Court issue an order enjoining Joyce from further using or infringing American Timber's  
2 trademarks or trade names;

3 8. That judgment be entered in favor of American Timber and against Joyce on the  
4 Eleventh Counterclaim for Relief, and that Joyce be ordered to disgorge all compensation paid  
5 to Joyce during those times he was not acting on American Timber's behalf;

6 9. That American Timber be awarded its costs and expenses incurred herein,  
7 including its attorneys' fees and expert witness fees;

8 10. For prejudgment interest; and

9 11. That American Timber be awarded any other and further relief that the Court  
10 considers just and proper.

11  
12 Date: October 30, 2007

KLEIN, DeNATALE, GOLDNER,  
COOPER, ROSENLIB & KIMBALL, LLP

13  
14 By: /s/  
15 Jeffrey W. Noe  
16 Attorneys for Defendant and Counterclaimant,  
17 AMERICAN TIMBER AND STEEL CO.,  
18 INC., sued herein and f/k/a MIDWESTERN  
19 WHOLESALE, INC.  
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